(27)

Brief of Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 940

CITY OF ORANGEBURG,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FRANK G. TOMPKINS,
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Opinions Below:

The Restraining Order of the District Court, is found at R. 1.

Opinion of the District Court for the Eastern District is reported in 45 Fed. Sup. 734, (R. 2-14).

Opinion of the United States Circuit Court of Appeals is found in 134 Fed. (2), 890, (R. 25-32).

Opinion of the District Court is reported in 55 Fed. Sup. 167, (R. 45-53).

Opinion of the District Court for the Eastern District of South Carolina, is reported in 55 Fed. Sup. 171, (R. 53-74).

Findings of Fact, (R. 74-75).

Conclusions of Law, (R. 76).

Order, (R. 69-70).

Opinion of the United States Circuit Court of Appeals is found in 145 Fed. (2d) 725, (R. 94-102).

Questions Involved

1. Did the lien of the paving assessment expire previous to the time suit was instituted?

2. Did the Court have jurisdiction of the *res?*

Statutes Involved

Article X, Section 16, Constitution of South Carolina of 1895 (R. 34).

Act No. 345, Acts of 1915, page 586, of the General Assembly of the State of South Carolina, (29 Stat. at Large, 586). (R. 34-35).

Ordinance of the City of Orangeburg, (R. 35-38).

Statement

This action was instituted in the Court of Common Pleas for Orangeburg County, South Carolina, by the service of a summons and complaint therein on December 14th, 1940. Thereafter, on the second day of January, 1941, the action was removed to the United States District Court for the Eastern District of South Carolina, on the ground of diversity of citizenship.

The suit was for the purpose of foreclosing an alleged lien on certain land which was used by the respondent as a right-of-way for railroad purposes, which said lien arose out of assessments levied for the purpose of paying for street improvements abutting said property.

Thereafter, to-wit, on the 14th day of January, 1941, the petitioner brought another action in the Common Pleas Court for Orangeburg County, to which suit respondent was not a

party, against Southern Railway-Carolina Division, a South Carolina corporation, alleging that the said corporation was the real owner of the land involved, and at the same time, the petitioner attempted to levy an execution on the same lands. The respondent then, by petition in the United States District Court, sought to have the further prosecution of the suit against Southern Railway-Carolina Division and the attempted levy enjoined, on the ground that the United States District Court had jurisdiction of the *res* and that the State court was without authority to proceed further in the cause.

The matter came on to be heard before the United States District Court for the Eastern District of South Carolina, and on June 25th, 1942, that Court rendered an opinion holding that it had jurisdiction of the *res* (R.-13) and ordered that the City of Orangeburg and its tax collector be enjoined "from taking any further action and steps in said cause so long as the instant suit in this court is pending; and that they further be enjoined and restrained from doing or performing any acts by way of summary process or in any other manner, or proceeding attempting to enforce the said claim or lien for street improvements other than in the instant case in this Court." (R. 1).

The petitioner herein appealed from that decision to the Circuit Court of Appeals for the Fourth Circuit, which on April 12, 1943, affirmed the decision of the lower Court, holding that the Southern Railway-Carolina Division was not an indispensable party to the action, and that the issues involved could be decided in its absence without in any way jeopardizing its interests. (R. 32). This decision was based upon the undisputed fact that Southern Railway Company held the property involved under a lease for 999 years executed on June 30, 1902, (R. 28), which lease provided that the said Southern Railway Company would discharge all of the duties and obligations imposed by the states through which it operated, or other authorities, and that it would not permit any claim to be created by its act or neglect against the lessor which might be adjudged to be a lien upon the

property of Southern Railway-Carolina Division, its lessor. (R. 23).

In pleading to the merits of the case, the respondent set up as its second defense that the suit was barred by the statute of limitations and the assessment was no longer a valid lien against the property by reason of the fact that the ordinance under which it was laid provided that the lien should expire within five years from the date on which the final payment should become due, unless sooner paid. (R. 36). The District Court at a special hearing, considered this defense, and by its order dated February 7th, 1944, (R. 45-53), ordered it stricken from the answer.

The case then came on for trial on the merits, on other defenses raised by respondent's pleadings, at which time respondent attempted to renew its second defense, but the Court overruled it. (R. 47). The trial resulted in a verdict for the petitioner for the full amount of the alleged assessment, with interest. (R. 76-77).

The respondent proved that the petition of the abutting property owners was filed on April 10th, 1925, and that thereafter, on the 20th day of July, 1925, it served upon the City of Orangeburg a notice that it would "decline and refuse to pay any portion of such paving assessment which may be levied against it by reason thereof". (R. 82). In spite of this notice, however, and in spite of the fact that the paving was laid and accepted by the City on December 16th, 1926, under an ordinance which provided that "Each owner of the property so assessed may, within thirty days after the completion and acceptance by City Council of such improvement immediately abutting the property of such owner, pay into the City Treasury the full amount of such assessment, or shall have the right * * * to have such assessment divided into ten equal payments," (R. 36), the city failed to take any action to enforce its lien until December 14th, 1941, when this action was instituted.

The respondent herein appealed from the decision of the District Court to the Circuit Court of Appeals for the Fourth Circuit, both from the refusal of the District Court to sustain

its second defense and from errors assigned arising out of the trial of the cause on its merits generally. The District Court on November 11th, 1944, rendered its opinion in which it stated that whereas the other questions raised by the respondent were important and would call for careful examination, these questions would not be considered because of the fact that they were of the opinion that the "lien of the assessment, even if originally valid, cannot now be enforced against the Railway Company because the pending suit was not brought until after the expiration of the five year period during which the lien was continued and kept alive by the terms of the assessment ordinance." (R. 95).

Reasons for Refusing the Writ

Petitioner sets out that this Court should grant a *writ of certiorari* for the reason that the Circuit Court of Appeals has decided an important question of local law in a way that is probably in conflict with applicable local decisions. We contend, and shall endeavor to show that rather than being in conflict with local decisions, the Circuit Court of Appeals has followed the law as laid down by the Supreme Court of South Carolina.

Petitioner makes the statement, in assigning reasons for granting the writ, that the effect will be to permit a foreign corporation to avoid the assessment for street improvements. We call to the Court's attention the fact that the citizenship of the respondent has had nothing to do with the merits of the case, other than to give it the right to go into the United States District Court, rather than to try the case in the State Courts, and therefore in no wise represents a discrimination against citizens of the state.

1. Limitations and the Life of the Lien

The sole question here involved is whether or not the lien had expired by its own limitations at the time suit was instituted. We think, as a matter of fact, the opinion rendered by the Circuit Court of Appeals on November 11, 1944,

(R. 94-102) fully answers all of petitioner's contentions. We shall endeavor, however, more explicitly to show why this decision is not in conflict with the local decisions.

On December 16, 1926, the paving of South Boulevard or South Railroad Avenue, was completed and accepted by the City of Orangeburg, and one-third of the cost of the paving abutting the property described in the complaint was entered upon the book of "Assessment Liens" and assessed against the defendant.

The assessment was made by the City pursuant to authority contained in Article X, Section 16 of the Constitution of South Carolina (R. 34), Act No. 345 of the South Carolina Acts of 1915 (R. 34-35) and an ordinance passed by the City Council of Orangeburg on the 12th day of July, 1918. (R. 35-38). No payments were ever made on the assessment, and the City took no steps to enforce the collection of its assessments until it brought this suit on December 14, 1940.

Although the Act of 1915 mentioned above authorized the City to levy such assessments, nothing is said in it about how such assessments shall be paid. In fact, the Act is in the identical words of the Constitutional provision hereinabove mentioned. In view of the fact that the Supreme Court of South Carolina has held that such provisions of the constitution are self-executing and need no enabling legislation, we may dismiss the provisions of the Act itself from consideration. *Beatty vs. Wittekamp, et al.*, 171 S. C. 326; 172 S. E. 122; *Town of Cheraw vs. Turnage, et al.*, 184 S. C. 76, 191 S. E. 381.

Under the provisions of the ordinance, the lien of the paving assessment expired five years after the date provided for final payment, unless sooner paid. Petitioner contends that the date for final payment was nine years from January 15, 1927, and that the lien did not expire for five years from that time. Respondent contends that the day of final payment was thirty days from the time the paving was accepted by City Council, and that the lien expired five years from that date, or on January 15, 1932.

In two recent cases, *Cleveland vs. City of Spartanburg*, 185 S. C. 373, 194 S. E. 128, and *Blake vs. City of Spartanburg*, 185 S. C. 398, 194 S. E. 125, the Supreme Court of South Carolina had under consideration an ordinance practically identical with the one here involved, which ordinance provided:

> "When said assessment roll has been ratified in the manner prescribed, each owner of property so assessed may, within thirty days after such ratification, pay into the City Treasury the full amount of such assessment, or shall have the right to have such assessment divided into five equal payments, the first installment thereof shall be due thirty days after the date of the ratification of the assessment roll by the City Council, and the remaining installments shall be due in equal amounts, due respectively in one, two, three and four years, from the date of the first installment, * * *". (R. 40, Par. 4).

The material portion of the Orangeburg ordinance under consideration in this case, reads as follows:

> "Each owner of the property so assessed may, within thirty days after the completion and acceptance by City Council of such improvement immediately abutting the property of such owner, pay into the City Treasury the full amount of such assessment, or shall have the right * * * in case of the improvement of streets to have such assessment divided into ten equal payments; the first installment thereof shall be due thirty days after the date of the completion and acceptance by City Council of such improvement immediately abutting his property, and the remaining installments shall be due in equal amounts, due respectively in one, two, three, four, five, six, seven, eight and nine years from the date of the first installment, * * *". (R. 36, Par 2).

Mr. Justice Fishburne, in deciding that the lien of the assessment had expired, construing the Spartanburg ordinance, in the *Cleveland case, supra*, said:

"It is argued on behalf of the City that the failure of the plaintiff to pay the whole amount of the assessment within thirty days is a substantive fact, evidencing her desire to take advantage of her right to pay in installments. The words 'right to have' (Section 4 of the ordinance) with reference to installment payments, contemplate some positive action on the part of the property owner evidencing a choice of option. Non-action on the part of the property owner does not indicate an election, nor does such inaction, under these circumstances, give the right to make an election for the property owner. Under the ordinance this right resided in the plaintiff, and it could be given vitality only when she chose to exercise it by complying with the ordinance provisions which conferred it. She did not do so. The ordinance laid no compulsion on her to do so; nor does it give the City, in the absence of her agreement and compliance, the right to arbitrarily place her in the deferred payment class. Upon her failure to adopt the installment payment plan, which was optional, the whole amount of the assessment became payable within the 30-day period allowed. When she failed to pay it, the City's cause of action accrued.

"Under the ordinance, the plaintiff could have adopted either course, but she did neither, and in our opinion the City's right of action accrued at the end of the 30-day period, and the life of the lien expired 5 years thereafter, to-wit, in 1933."

The petitioner, in its brief, makes much of the fact that under the enabling Act the property owners of Spartanburg were entitled to such terms as to deferred payments, as "may be agreed upon as prescribed by ordinance". We fail to see how this differentiates it from the case at bar.

The Supreme Court of South Carolina went on further to say in the *Cleveland case, Supra*:

"As was said in 44 C. J. 3420, * * * Such provisions (the payment of assessments in installments) are gen-

> erally construed to confer on a property owner an option to pay in installments, and not to require him to do so or to prevent him from paying the whole assessment at any time by paying the amount thereof and such interest as he is liable for, at the time of payment, under a proper construction of the statute. It is proper to attach just and reasonable conditions to the privilege of paying in installments, such as that the owner shall give a bond, waive non-jurisdictional defects and informalities in the proceedings and pay interest on the deferred installments; and the privilege is not available to the property owner unless he complies with the conditions and exercises the option within the time prescribed."

In construing the Spartanburg ordinance, the Court considered the enabling Act. However, what effect, if any, this Act had upon the meaning of the ordinance is immaterial here, since the Court took occasion, in the same case, to construe the *words* of the ordinance alone, which, as we have pointed out, require some positive action evidencing a choice of option on the part of the landowner in order to put the deferred payment plan in effect.

As was said in *Blake vs. City of Spartanburg*, 185 S. C. 398, 194 S. E. 125.

> "Where the landowner requests the privilege of paying an assessment in installments over a period extending beyond the limitation period, according to an optional plan provided by statute, he cannot then set up the statute of limitations as a bar to an action for an installment after the limitation period.
>
> "But if the landowner makes no request and is not estopped from denying the making of such request, the mere adoption by the City of the installment plan will not operate to extend the statutory limitation period."

We think that Mr. Justice Soper, speaking for the Circuit Court of Appeals was correct when he stated (R. 98):

> "* * * It is not reasonable to conclude in the case of a property owner, who denies all liability, that the City cannot sue for the full amount thirty days after the work has been accepted, but can only sue for each installment, as it becomes due under the installment plan, over a period of nine years. Indeed we think that in any case, whether the property owner has refused to pay the assessment or not, the whole assessment is due at the end of the thirty day period, and the limitations began to run from that point of time, unless the property owner affirmatively exercises the right to pay in installments."

We respectfully contend that the decision of the Circuit Court of Appeals was in full conformity with the decisions of the Supreme Court of South Carolina involving this same question, and that the *writ of certiorari* should be denied.

2. The Question of Jurisdiction

Petitioner contends that because the respondent, Southern Railway Company, is merely a lessee, under a lease running from June, 1902 for 999 years, and because this is an action in *rem*, the United States District Court was without jurisdiction to hear or decide the matter. The question at issue is really whether or not Southern Railway-Carolina Division, the South Carolina corporation which acquired whatever interest in the land the original railroad or railroads had, is an indispensable party. The District Court held that the respondent certainly "had a very decided interest in this land since it was actually in occupancy thereof, using it for railroad purposes, and was the holder of a lease which was to run for a term of nine hundred and ninety-nine years from 1902." (R. 9). This lease, as heretofore pointed out, required that the respondent corporation should discharge all of the duties and obligations which may be lawfully imposed by the states or other authorities, upon the South Carolina Corporation (i.e. Southern Railway-Carolina Division) as the owner and lessor of the demised lines of rail-

road and the respondent company specifically agreed under the terms of the lease that it would not permit or suffer any claim or demand to be created by its act or neglect which might be adjudged to be a lien upon the property of the South Carolina Corporation. (R. 23).

The Circuit Court of Appeals, in its opinion discussing this phase of the question, said (R. 28):

> "It is obvious that by this transfer the Southern Railway Company became the virtual owner of the property even though it be considered that under the South Carolina decisions the technical relationship between the parties to the lease is that of lessor and lessee. *Columbia Ry. Gas & Elec. Co. vs. Jones*, 119 S. C. 480, 112 S. E. 267. The taxing statutes of the State treat the relationship of the lessee to the land in such a conveyance realistically, for Sec. 2687 of the South Carolina Code provides that all leasehold estates held on perpetual lease or for a term renewable forever at the option of the lessee shall be valued for taxation at the full price of the land and continue to be taxed as such to the end of the term. In the light of the rights and duties of the Southern Railway Company under the lease and under the taxing statutes of South Carolina, and in view of the nature of the suit to enforce the lien of an assessment disclosed in *Town of Cheraw vs. Turnage*, *supra*, there can be no doubt that the Southern Railway Company had such an interest in the property as to justify the institution and maintenance of the suit against it without the joining of the Southern Railway-Carolina Division as joint defendant. In that suit the validity of the assessment can be determined, the extent of the obligation resting upon the party bound to pay all taxes and assessments can be ascertained, and, if necessary, the lien of the assessment can be enforced by the sale of an interest in the land which for all practical purposes amounts to complete ownership."

The District Court in its opinion said, moreover, with reference to the ownership of the land, (R. 5, Par. 3):

"From the foregoing it will appear that there seems to be a grave doubt as to who is the actual owner of the fee to the land in question. In the argument it was generally admitted that it was uncertain whether the fee in these lands was ever acquired by any one or more of the railroad companies hereinabove named or any of their predecessors, but that they did hold rights for the use thereof for railroad purposes and the lands had been devoted to such use. The lands are at present in the actual possession and control of the Southern Railway Company under this long term lease and it is using and exercising all of the rights and franchises acquired under its lease and held by its predecessors in and to this land."

If what is said in the quotation next above respecting the fee to the land be true, it would appear from the foregoing, therefore, that even if it were to be held that the interest of Southrn Railway Company is not sufficient to give the Court jurisdiction of the *res*, the same defect would be present in any suit against the South Carolina Corporation and its predecessors in title, and the petitioner would have to search out those persons who at this time may actually own the fee in the land and to whom it would revert when it is no longer used for railroad purposes, and join them as indispensable parties.

Petitioner asserts in its brief that the decisions of the Courts below are not in conformity with the decision in the case of *Baltimore and Ohio Railroad Company vs. City of Parkersburg*, 268 U. S. 35, 45 Sup. Ct. Rep. 382, 69 L. Ed. 834. An examination of that case shows that it is entirely different from the one at bar. In that case, the Baltimore & Ohio Railroad, which has acquired all the stock in a West Virginia railroad and operated it under the name of Parkersburg Branch Railroad Company, sued the City of Parkersburg in the Federal Court to enforce an exemption from municipal taxation which the Northwestern Virginia Railroad Company, predecessor in title to the Parkersburg Branch Railroad Company, had acquired from the City.

The United States Supreme Court held in effect that the contract was the property of the Parkersburg Branch Railroad, and therefore if the Baltimore & Ohio was suing as the corporate owner of the property, but under the name of the Baltimore and Ohio, there was no diversity of citizenship so as to give the Federal Court jurisdiction, but that if it were suing in its own name, as owner of the Parkersburg Branch, the Parkersburg Branch was an indispensable party without whom the suit could not be prosecuted. There was no question there involved as to whether or not the Baltimore & Ohio Railroad was actually in possession of the *res* as here; in fact the Court inferred that it was not, but that the property at all times remained in the possession of the Parkersburg Branch.

It is worthy of note that this particular case was cited by the Circuit Court of Appeals in its opinion holding that the Federal Court had obtained jurisdiction and that the South Carolina Corporation was not an indispensable party. (R. 30).

In conclusion, we think that the opinion of the District Judge, filed June 25th, 1942, (R. 2-14) and the Opinion of the Circuit Court of Appeals, filed April 12, 1943 (R. 26-32), are irrefutable answers to petitioner's contention that the United States Court has not jurisdiction in this cause.

Conclusion

It is respectfully submitted that the *writ of certiorari* prayed for by petitioner should be refused.

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